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SERVICE DATE – JULY 28, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36104

THE CITY OF OZARK, ARK.—PETITION FOR DECLARATORY ORDER

Digest:[1] The Board finds that requiring reinstallation of an at-grade crossing in Ozark, Ark. under state law is preempted by 49 U.S.C. § 10501(b).

Decided: July 26, 2017

On February 13, 2017, the City of Ozark, Ark. (the City), filed a petition for declaratory order requesting that the Board find that reinstallation of an at-grade crossing in Ozark, Ark., over tracks owned by Union Pacific Railroad Company (UP) is not preempted by 49 U.S.C. § 10501(b). On March 6, 2017, UP filed a reply, in which it argues that reinstallation of the crossing is preempted because it would unreasonably interfere with UP's rail operations and create undue safety risks to UP employees and persons using the crossing. For the reasons discussed below, the Board concludes that an at-grade crossing at the proposed location would unreasonably interfere with UP's present and future rail operations on the tracks at issue. Reinstallation of the crossing at the proposed location is therefore preempted under § 10501(b).

BACKGROUND

This dispute concerns the reinstallation of an at-grade crossing over railroad tracks owned by UP in Ozark at the same location where a crossing was removed in 2001. (City Pet. ¶¶ 2, 3.) The City states that the original crossing was constructed in 1876 by UP's predecessor, the Little Rock and Fort Smith Railroad, (id. at ¶¶ 2, 70), and provided access to land along the north shore of the Arkansas River, (id. at ¶ 36). The City further states that this land was used over the course of 85 years for private residences, the town dump, a pallet plant, the storage of large propane tanks, and recreational purposes. (Id. at ¶ 37.) According to the City, the crossing was unilaterally closed in February 2001 by UP, in violation of state law. (Id. at ¶ 3.) The City states that it plans to develop approximately 1.8 acres of this land on the north shore of the Arkansas River. (Id. at ¶ 36.) According to the City, this land can be accessed only by traveling across UP's tracks at the location of the original crossing. (Id. at ¶¶ 2-3, 36.)

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

In 2014, the City filed a complaint in the Circuit Court of Franklin County, Ark., against UP, the Arkansas State Highway and Transportation Department, and the Arkansas State Highway Commission seeking a declaration that the crossing was removed "illegally, without authority, and in violation of Arkansas law" when UP closed the crossing in 2001. (Id. at ¶¶ 2-3.) The City sought an order requiring that UP reinstall the crossing at UP's sole expense and for damages related to UP's activities that restricted the City's access to the leased property south of UP's railroad tracks. (Id. at ¶ 3.) In the alternative, the City sought authorization from the circuit court to survey and condemn the previous location of the crossing for the installation of a new public at-grade crossing. (Id. at ¶ 4.) The case was removed to the United States District Court for the Western District of Arkansas, and the City filed an amended complaint.

On December 10, 2015, the district court granted judgment in the City's favor, ruling that the former crossing was a public, at-grade crossing that was not properly closed according to Arkansas law. City of Ozark, Ark. v. Union Pac. R.R., 149 F. Supp. 3d 1107, 1120 (W.D. Ark. 2015), rev'd, 843 F.3d 1167 (8th Cir. 2016). The district court rejected UP's federal preemption defense under 49 U.S.C. § 10501(b), finding instead that "preemption is not at issue because the [c]rossing was not closed legally to begin with." 149 F. Supp. 3d at 1116. The district court ordered UP to restore the crossing to its pre-2001 condition at UP's expense. Id. at 1120. UP appealed the ruling to the United States Court of Appeals for the Eighth Circuit, arguing that the district court erred when it failed to find reinstallation of the crossing preempted under § 10501(b). City of Ozark, 843 F.3d at 1170.

The Eighth Circuit "emphatically disagree[d]" with the district court, finding that the focus of preemption under § 10501(b) is whether the state law remedy "will unreasonably interfere with rail operations as they are conducted today or are likely to be conducted in the future," and not whether the crossing "was closed in violation of state law more than fifteen years ago." 843 F.3d at 1172. The court also noted that UP had presented "concrete evidence that reopening this specific [c]rossing would impede rail operations or pose undue safety risks." Id. at 1173 (internal quotation marks and citation omitted). The Eighth Circuit, therefore, reversed the district court's decision and remanded the case for a determination whether the crossing dispute is "within the exclusive jurisdiction of the [Board]." Id. at 1172. The Eighth Circuit further suggested that "it would be appropriate for the district court to defer entry of a final judicial determination whether the City's claims are preempted if the City requests an opportunity to petition the [Board] for a declaratory order resolving the issue of its exclusive jurisdiction." 873 F.3d at 1173. Accordingly, on remand, the City sought leave from the district court to petition the Board for a declaratory order to resolve any issues concerning the Board's jurisdiction, (City Pet. Ex. Q-1), and the district court granted such leave, (id. at Ex. Q-2).[2]

As noted above, the City filed a petition for declaratory order with the Board on February 13, 2017, and UP replied on March 6, 2017.

[2] The Board and the courts have concurrent jurisdiction to determine questions of federal preemption under 49 U.S.C. § 10501(b), applying existing court and Board precedent. E.g., 14500 Limited LLC—Pet. for Declaratory Order, FD 35788, slip op. at 2 (STB served June 5, 2014).

DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 1321 to issue a declaratory order to terminate a controversy or remove uncertainty. The Board finds it appropriate to issue a declaratory order addressing the at-grade crossing controversy here. As discussed below, the Board concludes that the proposed at-grade crossing would unreasonably interfere with UP's present and future railroad operations, and any state or local action requiring reinstallation of the crossing is therefore preempted under § 10501(b).

The Interstate Commerce Act gives the Board broad and exclusive jurisdiction over "transportation by rail carrier." 49 U.S.C. § 10501(a)(1). The statute defines rail transportation expansively to encompass any locomotive, property, facility, structure, or equipment "related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 49 U.S.C. § 10102(9). Section 10501(b) states that "the remedies provided under [49 U.S.C. §§ 10101-11908] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." The primary purpose of § 10501(b) is to prevent a patchwork of local regulation from interfering with interstate commerce. See Tubbs—Pet. for Declaratory Order, FD 35792, slip op. at 5 (STB served Oct. 31, 2014), aff'd 812 F.3d 1141 (8th Cir. 2015); U.S. Envtl. Prot. Agency—Pet. for Declaratory Order, FD 35803, slip op. at 7 (STB served Dec. 30, 2014); Norfolk S. Ry.—Pet. for Declaratory Order, FD 35701, slip op. at 6 n.14 (STB served Nov. 4, 2013); H.R. Rep. No. 104-311, at 95-96 (1995). As the courts have observed, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." City of Auburn v. United States, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting CSX Transp. Inc. v. Ga. Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)). Federal preemption applies without regard to whether the Board actively regulates the railroad operations or activity involved. 49 U.S.C. § 10501(b)(2); Pace v. CSX Transp., Inc., 613 F.3d 1066, 1068-69 (11th Cir. 2010); Port City Props. v. Union Pac. R.R., 518 F.3d 1186, 1188 (10th Cir. 2008).

It is well settled that § 10501(b) categorically preempts state or local laws and legal claims that would regulate rail transportation directly or that could be used to deny a railroad's ability to conduct rail operations. See Wichita Terminal Ass'n—Pet. for Declaratory Order, FD 35765, slip op. at 6 (STB served June 23, 2015). Courts and the Board have found that state or local actions that "have the effect of managing or governing," and not merely incidentally affecting, rail transportation are expressly or categorically preempted under § 10501(b). State of Delaware v. STB, 859 F.3d 16, 18 (D.C. Cir. 2017) (internal quotation marks omitted); Tex. Cent. Bus Lines Corp. v. City of Midlothian, 669 F.3d 525, 532 (5th Cir. 2012); Franks Inv. Co. v. Union Pac. R.R., 593 F.3d 404, 410 (5th Cir. 2010) (en banc) ("[L]aws that have the effect of managing or governing rail transportation will be expressly preempted."); CSX Transp., Inc.—Pet. for Declaratory Order, FD 34662, slip op. at 3 (STB served May 3, 2005) (actions by a state or local entity that directly conflict with the "exclusive federal regulation of railroads" are preempted).

Even where not categorically preempted, state and local actions may be preempted "as applied"—that is, if they would have the effect of unreasonably burdening or interfering with rail

transportation at present or in the future. See Franks Inv. Co., 593 F.3d at 414; N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007); see also Tri-City R.R.—Pet. for Declaratory Order, FD 35915, slip op. at 7-8 (STB served Sept. 14, 2016) (finding preemption applied where an at-grade crossing would unreasonably interfere with the petitioner's present and future railroad operations); City of Lincoln—Pet. for Declaratory Order, FD 34425, slip op. at 4 (STB served Aug. 12, 2004), aff'd sub nom. City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005) (considering a railroad's future plans to determine whether a city's proposed condemnation of railroad right-of-way was preempted). To determine whether the action is preempted as applied, the Board analyzes the facts and circumstances of the case. E. Ala. Ry.—Pet. for Declaratory Order, FD 35583, slip op. at 5-7 (STB served Mar. 9, 2012). The Board has stated that "routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings . . . are not preempted so long as they would not impede rail operations or pose undue safety risks." Maumee & W. R.R.—Pet. for Declaratory Order, FD 34354, slip op. at 2 (STB served Mar. 3, 2004); see also E. Ala. Ry., FD 35583, slip op. at 4 (finding that an easement across a railroad's property for subterranean water and sewer pipes would not unreasonably interfere with rail operations).

Here, the City asks the Board to find that the reinstallation of a crossing is not preempted by § 10501(b). (City Pet. at ¶ 67.) The City argues that the crossing would not interfere with railroad operations or create undue safety risks because a crossing previously existed at the same location for approximately 85 years until it was, according to the City, removed illegally under state law. (Id. at ¶ 66.) According to the City, the facts of this case are unique because the Board has not yet decided a preemption case where a railroad has removed a public crossing illegally under state law and later shielded itself from replacing the crossing by arguing federal preemption. (Id. at ¶¶ 65-66.) The City further argues that reinstallation of the crossing would merely incidentally affect UP's rail operations, citing Franks Investment Co. v. Union Pacific Railroad, 593 F.3d 404, a case in which the court found a possessory action brought by a property owner seeking to enjoin a railroad from removing private crossings was neither categorically preempted nor preempted as applied by ICCTA. (Id. at ¶¶ 69-70.)

On reply, UP argues that reinstallation of the crossing would unreasonably interfere with its rail operations. UP explains that there are currently four tracks at the location where the City seeks to have the crossing reinstalled. (UP Reply 7.) Specifically, there is a main line track over which 10 to 20 trains per day operate; a long side track, which is used for trains to pass one another and for storage; and two "house" tracks used for setting out cars. (Id.) According to UP, reinstalling the crossing would (i) prevent UP from fully utilizing the storage track; (ii) reduce rail line capacity on the Van Buren subdivision by as much as 44-118%; (iii) cause loss of approximately 625 feet or 16% of siding storage capacity; (iv) prevent local train meets at this location, forcing a reduction in line capacity; and (v) increase the number of switching operations because cars would have to be set out on different sides of the crossing. (Id. at 8.) UP also argues that the reinstallation of the crossing would cause numerous undue safety risks. According to UP, pedestrians attempting to pass over the crossing would be at risk of injury because inadequate sight lines would not allow a pedestrian or a vehicle to see oncoming trains. (Id. at 8-9.) UP states that the risk of train derailments would also increase at this location because of the downgrade, "sweeping" curve on the approach to the crossing, the inadequate sight lines, and the potential for trains to be placed into emergency braking to avoid a pedestrian

or a playing child. (Id. at 9.) Lastly, UP argues that reinstallation of the crossing would create safety risks to UP employees due to the resulting increase in the number of switching operations. (Id.)

Here, the Board concludes that reinstallation of the crossing is federally preempted as applied under § 10501(b) because it would unreasonably interfere with UP's present and future railroad operations and cause undue safety risks.[3] As the Eighth Circuit noted, 843 F.3d at 1173, UP has presented "concrete evidence" that reinstallation of the crossing at the proposed location would restrict UP's ability to conduct its current operations by reducing both line and siding storage capacity while increasing costs and transit times. Cf. Franks Inv. Co., 593 F.3d at 415 (finding no preemption under as applied test where no specific evidence of interference with rail operations presented). The proposed location of the crossing would cross four of UP's tracks, including a mainline track, a long side track used as a storage track and for train meets, and two side tracks UP uses to set out cars. Installing a crossing at this location would restrict UP's use of the side tracks, causing trains and equipment that otherwise would have been cleared onto the side tracks to block the mainline and create train delays and inefficiencies in UP's rail operations. (See UP Reply at 8; City Pet. Ex. G-1 Doc. 37-25, Huston Aff. ¶ 4, Dec. 8, 2014.) Furthermore, the increased switching of railcars required at the crossing would result in additional brake safety inspections, which can result in delays in train operations of up to 90 minutes. (Id. at ¶ 8.) The record also demonstrates that the crossing would pose safety risks to both UP employees and members of the public who traverse the crossing. (UP Reply at 8-9.)

Additionally, the Board finds the City's argument that reinstallation of the crossing would not interfere with railroad operations or create undue safety risks because a crossing previously existed in the same location to be unconvincing. As-applied preemption relies on the facts and circumstances of a particular case. Whether or not the crossing was improperly removed 16 years ago,[4] the location at which the crossing had existed has changed significantly since then: UP has added 600 feet of siding, which allowed UP to begin using the location for train meets, storage of maintenance of way equipment, and storage of work trains. (See City Pet.

[3] As a threshold matter, the Board must address the standard for determining whether preemption applies in this case. In its petition, the City argues that the reinstallation of the crossing would merely incidentally affect rail transportation, which (as discussed above) is relevant to a categorical preemption analysis. However, in cases involving routine non-conflicting uses, such as at-grade crossings like the one here, the Board examines whether the action is preempted based on an as applied analysis—that is, whether it would unreasonably burden or interfere with rail transportation at present or in the future based on the facts and circumstances presented. To the extent that the City means to suggest that the reinstallation of the crossing will not unreasonably interfere with rail transportation because it will have only incidental effects on UP's operations, the City has conflated the standards for categorical preemption and as applied preemption.

[4] The Board is not now presented with, and does not decide, the separate question of whether reliance on state law to prevent removal of the crossing a decade and a half ago would have been preempted. Such a case was never brought to the Board and the time to do so is long past.

Ex. G-7 Doc. 43 at 19.) Because of these changes in the extent of the track and UP's operations, requiring reinstallation of a crossing now would unreasonably interfere with UP's present and future operations. Accordingly, the Board finds that an order forcing UP to reinstall the crossing is preempted.

For the reasons discussed above, the Board finds that reinstallation of the crossing at the proposed location is federally preempted by § 10501(b).[5]

It is ordered:

1. The City's petition for declaratory order is granted to the extent discussed above.

2. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller. Board Member Miller concurred with a separate expression.

BOARD MEMBER MILLER, concurring:

I concur with the outcome of the Board's decision, but write separately to provide my view of this case. My decision to find that preemption applies in this instance should not be read to imply that rail carriers can ignore state and local laws regarding the regulation of crossings when applicable. Indeed, as explained in the Federal Highway Administration's Railroad-Highway Grade Crossing Handbook, "[j]urisdiction over highway-rail grade crossings resides primarily with the states." U.S. Dep't of Transp., Fed. Highway Admin., Railroad-Highway Grade Crossing Handbook 15 (2nd ed. 2007), https://www.fra.dot.gov/Elib/Details/L02829. Accordingly, unless a railroad can present a clear basis for why a state or local crossing regulation is preempted or is otherwise inapplicable, my expectation is that rail carriers will continue to comply with all such regulations.

In addition, railroads should not conclude that this decision creates a precedent that allows rail carriers to violate state or local laws and then use preemption to escape the consequences. As the decision makes clear, the Board must look at whether there would be present and future unreasonable interference with a railroad's operation in deciding preemption issues. However, in my view, a railroad's past conduct would have bearing on whether preemption is applicable – particularly where a railroad's claim of present and future unreasonable interference is purely the result of its own improper conduct.

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[5] Because neither the City nor UP presented an alternative location for the crossing, the Board need not address whether preemption would apply to the installation of a crossing at any other location. See, e.g., Wichita Terminal Ass'n, slip op. at 10-11 (addressing whether temporary location for crossing discussed by the parties in the record may be subject to preemption).

I do not believe that this is the situation here. UP removed the crossing only after requesting and receiving permission from the City's then-mayor and receiving no objection from the City council, followed by years without any complaint from the City. For these reasons, I concur with the holding of preemption based on a finding of present and future unreasonable interference.